Supreme Court, U.S.
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No.

# In the
# Supreme Court of the United States

**LAURA BAXTER,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether this petition should be granted in light of *Claiborne v. United States,* No. 06-5618, *cert. granted* 127 S.Ct. 551 (2006) and *Rita v. United States,* No. 06-5754, *cert. granted* 127 S.Ct. 551, 855 (2006), because, post-*Booker v. United States,* 543 U.S. 220 (2005), the United States Court of Appeals for the Seventh Circuit, while reviewing federal sentences within an advisory guidelines range, consistently relies on a "presumption of reasonableness," where nothing within 18 U.S.C. § 3553(a) incorporates such a presumption?

2. Whether, in accordance with 18 U.S.C. § 3553(a)(4)(A)(ii), the district court must consider the advisory guidelines in effect at the time of sentencing, where petitioner's plea agreement applied lower guidelines in effect at the time of the offense?

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Laura Baxter (hereafter petitioner or Ms. Baxter), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Seventh Circuit was filed on March 1,

2007. App. 1-7. No petition for rehearing was filed. The petitioner's May 24, 2006 sentencing transcript is unreported. Reproduced at App. 11 - 33.

## JURISDICTION

The decision and judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 1, 2007. App. 1-7, *infra*. The Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and the United States District Court for the Northern District of Illinois, Eastern Division, had jurisdiction pursuant to 18 U.S.C. § 3231.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## CONSTITUTION, STATUTES AND RULES

U.S. Constitution, Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 3553(a)

> § 3553. Imposition of a sentence
>
> (a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this

subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—(I) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

26 U.S.C. § 7212(a)

§ 7212. Attempts to interfere with administration of internal revenue laws

(a) Corrupt or forcible interference.—Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity

under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

Federal Sentencing Guidelines § 1B1.11

Section 1B1.11 states, in relevant part:

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b)(1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed. U.S.S.G. § 1B1.11 (2002) (same in 2006).

Federal Sentencing Guidelines § 5H1.11

Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)

Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

(Effective 11/1/04, § 5H1.11 was amended by striking "sentence should be outside the applicable guideline range" and inserting "departure is warranted.")

## STATEMENT

1. On April 8, 2004, in Chicago, the Special November 2002 Federal Grand Jury returned an 11-count indictment (04 CR 371) charging petitioner, an erstwhile Certified Public Accountant (CPA), with violating 26 U.S.C. §§ 7206(2) and 7212(a) (R. 1).

The *sine qua non* of petitioner's indictment related to the preparation and filing of false federal tax returns between the years 1995-1999, and impeding a particular tax audit in violation of 26 U.S.C. § 7212(a). Petitioner's charges stemmed from her participation with the Aegis Company (Aegis), a sophisticated tax shelter enterprise, which had been promoting a species of foreign and domestic "trusts" theoretically permitting taxpayers to legally avoid federal income taxes (R. 1 at ¶ 2). Petitioner, as well as dozens of other accountants and CPAs, were persuaded to accept Aegis referrals for the purpose of preparing federal tax returns for Aegis clients. Based on Aegis referrals, the indictment alleged that petitioner prepared and caused to be filed tax returns for a small number of Aegis referrals during calendar years 1995-1999 (R. 1, p. 1 at ¶s (1)-(4)). According to the government the tax returns prepared by petitioner were fraudulent because they understated income predicated on Aegis "trust system" deductions and expenses. Petitioner's presentence report noted that Ms. Baxter was married, with a 2 year old daughter and had owned her small suburban accounting firm since approximately 1991. Further, the Aegis client referrals comprised some seven (7) percent of petitioner's income from 1995-1999.

2. Post-indictment, petitioner was enlarged on an O.R. bond and represented by retained counsel (R. 5). In advance of trial, petitioner, pursuant to a plea agreement, agreed to enter a guilty plea to a superseding information charging a single 26 U.S.C. § 7212(a) violation (R. 33). App. 8 - 10.

On May 19, 2005, pursuant to indictment waiver and plea agreement, petitioner pleaded guilty to the superseding information. (R. 39-41). The plea package included an agreement between government and defense counsel that the district court's sentencing would be pursuant to the 1995 Federal Sentencing Guidelines. (R. 41, pp. 5-6, ¶ 6.) The same agreement included that petitioner and the government could challenge the impact, if any, of "relevant conduct." (R. 41, p. 6, ¶ 6(a)).

On September 27, 2005, the district court conducted a "relevant conduct" hearing in order to determine whether petitioner should be held responsible for the totality of the Aegis tax shelter misconduct.[1] Eventually, the district court held that petitioner was not responsible for the totality of the Aegis tax shelter activities. (Neither the government nor petitioner challenged the district court's findings on that score, hence petitioner omits further "relevant conduct" commentary.)

3. On May 24, 2006, the district court considered petitioner's presentence report and arguments of coun-

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[1] Several Aegis promoters were separately indicted for conspiring to violate federal income tax laws by virtue of their promoting the "Aegis" trust systems, *United States v. Hopper, Dunn,* and *Vallone* under Indictment 04 CR 372 (that indictment remains pending in the United States District Court, Chicago, Illinois). From all that appears, the combined district court records reflect that petitioner was the only accountant or CPA criminally charged in connection with the Aegis tax shelter promotions.

sel. Prior to imposing sentence, the following appears of record:

> The Court: All Right. There are certain factors, of course, *that the sentencing guidelines require me not to consider*. In evaluating a sentence, I must look objectively at the factors, but consider each defendant who comes before me.
>
> I believe a custody sentence is necessary, Ms. Baxter. I believe that home confinement would deprecate the seriousness of the offense. * * * . *Id.* at 27 (ital. emph. added; App. 29).

Thereafter the district court imposed a two-year federal custodial sentence. App. 29.[2]

4. **Appellate Proceedings**. Petitioner challenged the "reasonableness" of her sentence on direct appeal. She asserted, *inter alia,* that the district court's sentencing observations were skewed in that post-*United States v. Booker*, 543 U.S. 220 (2005), the district court was mandated to consider, while assaying the 18 U.S.C. § 3553(a) factors, petitioner's volunteer work on behalf of military veterans, senior citizens, chamber of commerce and community activities as variance components regarding whether any custodial sentence was mandated. Before imposing a two-year custodial sentence, the district court observed that it was prohibited from considering certain facets of the defendant's background (previously discouraged or prohibited, pre-*Booker*) (referring to USSG. 5H1.11). App. 29.

The appellate court rejected petitioner's plaints, finding that even were the "presumption of reasonableness"

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[2] On petitioner's motion, the district court stayed the execution of the sentence. The district court recently set a March 15, 2007 status date.

discounted, nonetheless the district court was not required to explain its reasons for disregarding guideline provisions such as § 5H1.11. App. 6 (noting circuit discord on same subject). Further, the affirming panel went on to erroneously infer that because the sentencing transcript disclosed that the district court mentioned petitioner's multiple civic and charitable activities, the sentencing judge *necessarily considered* petitioner's many "good-deeds" while divining that a two-year custodial sentence was mandated.

Yet the sentencing transcript discloses that the district court found that from the standpoint of "deterrent," petitioner would never again "engage in criminal conduct," nor was there any need to protect the public from future misconduct by petitioner. App. 28.

The government's answering brief urged affirmation, but failed to challenge the district court's observations regarding that which the guidelines "require[d] me [district court] *not to consider*" (ital. emph. added). Rather, the government emphasized that Seventh Circuit precedent required [a] "rebuttable presumption of reasonableness." (Gov. Brf. before USCA 7, No. 06-2577 at pp. 10-11 (citing, *inter alia, United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). Thereafter, the government's brief went on to suggest that petitioner's case was strikingly similar to *Ayers v. Belmontes*, ___ U.S. ___, 127 S.Ct. 469 (2006) (Gov. Brf. at 16-17). Of course, *Ayers* was a capital case where the question before the Court related to whether jury instructions involving "forward-looking" mitigation evidence failed to satisfy the Eighth Amendment.

Further, the government's appellate brief contended that the district court erred in applying the 1995 advisory 24-30 month guideline sentencing range because, notwithstanding the plea agreement, § 3553(a)(4)(A)(ii) directs that the district court apply the advisory guideline

range in effect on the sentencing date, citing *United States v. DeMaree*,459 F.3d 791 (7th Cir. 2006). Gov. Brf. at 21-23 (addressed by petitioner, *infra*).

In all events, the affirming decision clearly relied, in part, on the "presumption of reasonableness," while discounting the future impact of this Court's decision in *Rita v. United States*, *cert. granted*, 127 S.Ct. 551 (2006). App. 5. Remarkably, the affirming panel eschewed confronting vexing questions regarding whether the district court may rely on a plea agreement incorporating language that the guidelines in effect at the time of the offense would be controlling, rather than § 3553(a)(4)(A)(ii), which directs that the advisory guidelines at the time of sentencing are controlling.

—♦—

## REASONS FOR GRANTING THE WRIT

1. Questions surrounding "presumption of reasonableness" remain unresolved and the United States Court of Appeals for the Seventh Circuit consistently relies on that presumption while affirming sentences imposed within the advisory guidelines range.

In *Cunningham v. California*, ___ U.S. ___, 127 S.Ct. 856 (2007), Justice Ginsberg, writing for the majority, explained that judicial factfinding was violative of the Sixth Amendment in connection with California's determinative sentencing scheme. A segment of the majority opinion observed that the Court had no occasion in *Cunningham* to elaborate "on the reasonableness check on federal sentencing post-*Booker*," because the Court had granted review in *Claiborne v. United States*, 127 S.Ct. 551 and *Rita v. United States*, 127 S.Ct. 551, 855 (both 2006). The reason for granting *cert* in *Rita* included the question "Whether it is consistent with *Booker* to

accord a presumption of reasonableness to a within-Guidelines sentence," 127 S.Ct. at 867 n. 13 (replicating petitioner's case). Justice Alito's *Cunningham* dissent also refers to *Claiborne* and *Rita* regarding reasonableness *vel non*, 127 S.Ct. at 880 n .13. On February 20, 2007 the Court heard arguments in *Claiborne* and *Rita* and, in the fullness of time, an opinion will issue.

The current circuit discord regarding the propriety of a "presumption of reasonableness" was recently articulated in Circuit Judge Sutton's concurring opinion in *United States v. Buchanan*, 449 F.3d 731 (6th Cir. 2006). The concurring opinion recounted the circuit divide as follows:

> By my count, six circuits have held that a district court's decision to sentence a defendant within the range of the advisory guidelines receives a "presumption of reasonableness" upon appeal. *United States v. Williams*, 436 F.3d 706, 708 (6th Cir.2006); *United States v. Johnson*, 445 F.3d 339, 341 (4th Cir.2006); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir.2006); *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir.2006); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir.2005); *United States v. Lincoln*, 413 F.3d 716, 717-18 (8th Cir.2005). One circuit, without addressing the propriety of a "presumption of reasonableness" in so many words, says that sentences within the advisory guidelines "ordinarily" will be reasonable. *United States v. Talley*, 431 F.3d 784, 788 (11th Cir.2005). And four circuits, all of them after our decision in *Williams*, have declined to adopt a presumption of reasonableness. *See United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir.2006) (en banc); *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir.2006); *United States v.*

> *Cooper*, 437 F.3d 324, 331-32 (3d Cir.2006); *United States v. Zavala*, 443 F.3d 1165, 1168-70 (9th Cir.2006) (rejecting a district-court presumption of reasonableness).

449 F.3d at 735. Undoubtedly the *Claiborne* and *Rita* opinions will serve to harmonize the manner in which the district courts and federal Courts of Appeals implement the manner in which sentencing reasonableness is to be determined under the current advisory guidelines scheme (assuming the advisory guidelines survive *Claiborne* and *Rita*).

Regarding petitioner's case, the United States Court of Appeals for the Seventh Circuit has consistently held, post-*Booker*, that a sentence within the guidelines range is presumptively reasonable, [or] (alternatively) carries a "rebuttable presumption of reasonableness." Gov. Brf. before U.S.C.A.7, No. 06-2577 at pp. 10-11 (citing *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) and *United States v. Sharpe*, 436 F.3d 730, 738 (7th Cir. 2006). In point of fact, the Seventh Circuit approach to both district and appellate courts reasonableness presumptions was recently explained in *United States v. Hankton*, 463 F.3d 626, 629 (7th Cir. 2006). While analyzing "reasonableness presumptions," the court explained [that] "the presumption that a correctly calculated Guidelines sentence is reasonable *not only applies to the appellate standard of reasonableness review, but also serves as a benchmark for trial judges in evaluating whether or not a Guidelines sentence is appropriate*" (ital. emph. added). And in *United States v. Gonzalez*, 462 F.3d 754, 755 (7th Cir. 2006), the Seventh Circuit showed a marked unwillingness to even consider a within-the-Guidelines sentence as unreasonable. Circuit Judge Posner, writing for the court, explained that where the sentencing judge failed to consider § 3553(a) factors, that was not enough to even raise the question that a within-the-Guidelines sentence

may be "unreasonable." 462 F.3d at 755-56 (characterizing those appeals as a "waste [of] time."). *Id.*

However, the Seventh Circuit fails to accord the same reasonableness presumption where the district court's sentence deviates from the guidelines, *United States v. Wallace,* 458 F.3d 606, 611 (7th Cir. 2006), *cert.* petition filed on 11/13/06; No. 06-7779 (in *Wallace* the district court assayed § 3553(a) factors and elected to provide *Wallace* with a downward departure or variance which the Seventh Circuit reversed). (For a cogent analysis of conflicting Seventh Circuit "presumption of reasonableness" precedent, see Zachary A. Jacobs, *A Presumption of Reasonableness: The Seventh Circuit's Unreasonable Approach to the Federal Sentencing Guidelines,* 2 SEVENTH CIRCUIT REV. 235, 243-256 (2006), at http://www.kentlaw.edc/7cr/v2-1/jacobs.pdf.).

In the petition at hand, as explained in the Statement of Facts, *ante,* the district court specifically excluded from § 3553(a) consideration the years of civic and charitable bookkeeping, accounting and tax work performed at no charge for United States military veterans, senior citizens and her local community including the local Chamber of Commerce. The district court also found that there was no need to protect the public from petitioner's future misconduct and that, in all events, there was no doubt in the mind of the sentencing court that the events leading up to the criminal charges represented an isolated event not capable of repetition. In a global sense, petitioner (gullible albeit a CPA) was the victim of sophisticated tax shelter promoters and the singular event described in the superseding information related to a single taxpayer who, in advance of petitioner being charged, permitted petitioner to make sure that he paid every cent the Internal Revenue Service determined he owed.

Yet the district court felt compelled to analyze petitioner's sentence starting with an advisory guidelines

range of 24-30 months (using an agreed upon 1995 USSG. § 2T1.1 analysis).[3] Why not start the sentencing analysis with the defendant's otherwise unsullied background, charitable acts, bookkeeping and tax preparation at no cost to seniors and veterans? Why must there be a "presumption"—rebuttable or otherwise—regarding a sentence imposed within an advisory guidelines range? There is nothing in the text of § 3553(a), post-*Booker*, mandating any such "presumption."

There are currently 674 United States District Court judges who must consider whether to send a defendant to federal prison for one day, one week or double-digit years. Most assuredly, each district court judge must be in a position to enjoy the autonomy provided by an appointment to the federal bench. As things currently stand, while awaiting the Court's *Claiborne/Rita* opinions, district court judges lack the autonomy to impose a "reasonable" sentence simply because a reviewing court (certainly in the Seventh Circuit) will automatically "presume" that a sentence within the advisory guideline range will be affirmed, but should a district court judge elect to exercise sound judicial discretion and impose a sentence below the same advisory range, the "presumption" [of reasonableness] evaporates, see *United States v. Wallace, ante,* 458 F.3d 606, 611 (7th Cir. 2006) and *United States v. Repking*, 467 F.3d 1091, 1095-96 (7th Cir. 2006) (vacating sentence below advisory guideline range).

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[3] During the February 20, 2007 oral argument in *Claiborne v. United States,* 18 U.S.C. § 3553(a)(4)(A) (ii) was referred to as simply one of the "seven" factors for sentencing consideration. After *Claiborne's* counsel referred to the foregoing section Justice Kennedy remarked: "Kind of a weak law of gravity like the moon. It's only at one-seventh." Oral Argument Tr. at p. 5. Justice Breyer referred to the same section at Tr. 10-11 (explaining the history of (a)(4)).

Regarding petitioner, recall that the district court, in advanced of imposing sentence opined: "*[t]here are certain factors, of course, that the sentencing guidelines require me not to consider*" (ital. emph. added). App. 29. Clearly, in context, the district court was referring to the many and varied civic and charitable activities performed by petitioner throughout her accounting/CPA years. And, of course, post-*Booker*, those activities, while previously prohibited or discouraged, are now clear factors that the district court must consider (referring to § 5H1.11). Further, assume, *arguendo*, that the district court would have been inclined to provide a downward departure (or variance as it is now known), on appeal by the government the Court of Appeals for the Seventh Circuit would have surely reversed because of its fixation on the "presumption of reasonableness" which evaporates where a sentence is even modestly lower than the applicable advisory guidelines range.

This petition illustrates the lack-of-circuit harmony regarding the putative "presumption of reasonableness" necessarily impacting on not only petitioner's case, but hundreds of others regarding the power of the district court to exercise its sound discretion while imposting sentences, and the manner those sentences are considered by the Eleven Federal Circuit Courts of Appeals.

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2. Whether, in accordance with 18 U.S.C. § 3553(a)(4)(A)(ii), the district court must consider the advisory guidelines in effect at the time of sentencing, where petitioner's plea agreement applied the lower guidelines in place at the time of the offense?

While petitioner pretermits a statistical analysis of a number of guilty pleas which incorporate plea agree-

ments, the Court may take judicial notice that over ninety or more percent of federal cases are resolved via guilty pleas. For example, in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971), the Court considered prosecution sentencing recommendations as a prominent component of guilty pleas. While holding that the prosecution's failure to abide by its sentencing recommendation rose to the level of prejudicial error, the Court noted that in 1964 guilty pleas accounted for 90.2 percent of all criminal convictions in United States District Courts. 404 U.S. at 264 n 1a, 92 S.Ct. at 499 n 1a. Certainly nothing after *Santobello* undermines the suggestion that at least 90 percent of all current federal criminal cases are resolved via guilty pleas.

In petitioner's case, the plea agreement, in accordance with the superseding information and guilty plea, included an agreement that the 1995 § 2T1.1 Federal Sentencing Guidelines would be embraced for the purpose of determining an advisory guideline range. R. 41, pp. 5-6, ¶ 6 ("For purposes of calculating the Guidelines promulgated by the United States Sentencing Commission pursuant to Title 28, United States Code, Section 994, the parties agree that the Guidelines effective November 1, 1995 apply."). Notwithstanding that agreement, the government's brief in the Court of Appeals asserted that the district court erred in *not imposing sentence* in accordance with the guidelines in effect at the time of sentencing (Gov. Brf., No. 06-2577 at pp. 21-22, citing 18 U.S.C. § 3553(a)(4)(A)(ii) and *United States v. DeMaree,* 459 F.3d 791, 794-95 (7th Cir. 2006) (Posner, J.)).

In *DeMaree*, Circuit Judge Posner theorized that since the guidelines were, post-*Booker*, advisory, there were no *ex post facto* implications to imposing sentence with reference to the advisory guidelines applicable at the time of sentencing. 459 F.3d at 794-95. However, *DeMaree* is silent regarding the impact of any contrary plea agreement and, further, *DeMaree* conflicts with *United States v.*

*Cruzado-Laureano*, 404 F.3d 470, 488-89 (1st Cir. 2005) and *United States v. Davis*, 397 F.3d 340, 346-52 (6th Cir. 2005); see also Zachary A. Jacobs' *Presumption of Reasonableness*, *ante*, at pp. 251-52, criticizing *Demaree*. *Cf. United States v. Safavian*, 461 F.Supp.2d 76, 81 (D.C. 2006) (affirming § 1B1.11 reasoning while criticizing *DeMaree*, collecting cases).

In *Cruzado-Laureano*, the court held that post-*Booker*, the defendant was entitled to sentence vacation and remand in accordance with USSG § 1B1.11(b)(1) because neither the district court nor the parties recognized that the wrong guideline manual was relied upon for sentencing purposes (holding that since the last offense of conviction occurred in 2001—the 2001—and not the 2000—guideline should have controlled). 404 F.3d at 488-89. The *Cruzado-Laureano* court explained that *Booker* did not undermine *ex post facto* considerations set forth in § 1B1.11(b)(1) which require that a defendant "be sentenced under the guidelines in effect when he committed the offense, rather than those in effect at the time of sentencing, where subsequent amendments would have increased his punishment," citing *United States v. Colon-Munoz*, 318 F.3d 348, 361 (1st Cir. 2003); as quoted in *Cruzado-Laureano*, 404 F.3d at 488, n 10.

Similarly, in *United States v. Davis*, 397 F.3d 340 (6th Cir. 2005), the court, post-*Booker*, considered *ex post facto* circumstances where the defendant maintained he should have been sentenced pursuant to 1991 guidelines (in effect when offense committed) as opposed to the 2002 guidelines (in effect at the time of sentencing). Again, the court visited §§3553(a)(4)(A)(ii) as contrasted with 1B1.11(a), and under [a] plain error analysis, the court vacated the defendant's sentence finding that *ex post facto* considerations warranted renewed sentencing. 397 F.3d at 346-52.

Given the circuit discord, blended with the significant re-occurring questions regarding whether the district court must embrace the advisory guidelines at the time of sentencing (§ 3553(a)(4)(A)(ii)), rather than at the time the federal offense occurred (§ 1B1.11(a)(b)), petitioner's question is straightforward: whether in the post-*Booker* sentencing universe, can the parties enter into a binding agreement that any sentence imposed by the district court will be advised by the guidelines in effect *at the time of the offense—rather than at the time of sentencing*?

If the answer is yes, then the Seventh Circuit's decision in *United States v. DeMaree, ante,* is clearly wrong, as was the position the government took in petitioner's case before the United States Court of Appeals for the Seventh Circuit. And surely, *DeMaree* conflicts with the First Circuit opinion in *United States v. Cruzado-Laureano,* 404 F.3d at 488-49 (2005) and the Sixth Circuit decision in *United States v. Davis,* 397 F.3d at 346-52 (2005).

Petitioner suggests that this petition provides an appropriate vehicle to resolve the important and re-occurring questions presented because they impact on over 90 percent of all federal criminal cases pending in the United States District Courts.

—♦—

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

App. 1

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

**United States Court of Appeals**
**For the Seventh Circuit**
**Chicago, Illinois 60604**

Argued February 27, 2007
Decided March 1, 2007

Before

Hon. DIANE P. WOOD, Circuit Judge

Hon. TERENCE T. EVANS, Circuit Judge

Hon. DIANE S. SYKES, Circuit Judge

No. 06-2577

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | Appeal from the United States District |
| *Plaintiff-Appellee,* | ) | Court for the Northern District |
| | ) | of Illinois, Eastern Division |
| v. | ) | |
| | ) | No. 04-CR-371 |
| LAURA BAXTER, | ) | |
| *Defendant-Appellant.* | ) | James F. Holderman, Chief Judge. |

## ORDER

Laura Baxter pleaded guilty to obstructing and impeding the administration of the federal tax laws, *see* 26 U.S.C. § 7212(a), and was sentenced at the low end of the guidelines range to 24 months' imprisonment. At sentencing, among many other things the district judge commented that "[t]here are certain factors, of course, that the sentencing guidelines require me not to consider." Seizing upon this statement, Baxter argues that her sentence is unreasonable because the district court erroneously thought that the guidelines constrained his discretion to consider the factors set forth in 18 U.S.C. § 3553(a). Taken out of context, we too would be concerned about the district court's statement. Reviewing the sentencing proceeding as a whole, however, it is evident that the district court fully understood its discretion to select a reasonable sentence and that it did not impose any limits at all on the evidence Baxter presented. If the court committed any error in its phrasing of the test, we are satisfied that the error was harmless and did not reflect the reality of its actions. We therefore affirm the sentence.

## I

In October 1997 Baxter, a certified public accountant, knowingly submitted false figures to an Internal Revenue Service auditor to foil an audit against one of her clients, a married couple. Her ploy worked: the audit was closed and the IRS found (at that time) that the couple owed no additional taxes. Several years later, however, during its investigation of a complex tax sheltering scheme known as the Aegis system, the government discovered what Baxter had done. The married couple had used the Aegis System to under report their income in a big way: Baxter's falsified submission to the auditor enabled them to avoid paying $576,000 in taxes. Baxter ultimately pleaded guilty in a written agreement to obstructing and impeding the administration of the federal tax laws, see 26 U.S.C. § 7212(a). For the purpose of computing relevant conduct, the probation officer considered the tax loss attributable to Baxter to be $576,000. Based on that, the probation officer calculated an offense level of 17, which when combined with Baxter's criminal history category of I, yielded a guidelines range of 24 to 30 months' imprisonment.

The district court conducted two sentencing hearings. At the first, held in September 2005, the government raised several objections to the PSR (none relevant to this appeal) and four witnesses testified on Baxter's behalf to her good character and charitable nature. One of Baxter's business associates, for instance, testified that Baxter filed tax returns at a discount for senior citizens and free of charge for military personnel.

After ruling that it was adopting the probation officer's recommendation, the court conducted the second hearing in May 2006. At this hearing, Baxter argued that in light of the factors set forth in § 3553(a), a non-custodial sentence would be reasonable. Baxter, her lawyers argued, was a hardworking and compassionate woman. They referred to several letters that Baxter's friends and family had submitted that explained how Baxter had built an accounting practice from the ground up; nursed a family friend through a battle with cancer; completed tax returns for senior citizens and military personnel free of charge; and volunteered with the Chamber of Commerce for the last ten years. Although they conceded the fact that her offense was a serious one, her attorneys asked the court to take into account the fact that her false submission to the IRS was an aberration and that she had completed thousands of tax returns without incident. Addressing the question of just punishment, they implored the judge to consider what Baxter had lost since being indicted: her accounting practice, her self-respect, and the respect of her community. Accordingly, they argued, there was little need for a long sentence for the purpose of deterring either Baxter herself or others in her position, nor was it necessary to protect the public from Baxter's future actions.

At the conclusion of the hearing, the district court addressed the factors in § 3553(a). Expressly referring to § 3553(a)(1), the judge found that "the history and characteristics of Ms. Baxter, of course, dictate toward a lighter sentence," but it reasoned that the serious nature of the offense, especially considering the significant amount of the tax loss, largely offset Baxter's redeeming qualities. Citing § 3553(c)(2), the court then explained that while it believed Baxter "will never again engage in criminal conduct," it also believed that the reference to "adequate

deterrence to criminal conduct [in § 3553(c)(2)] is not specific deterrence of the defendant . . . [b]ut it is to provide general deterrence." At this point, the judge uttered the statement that is the focus of this appeal:

> There are certain factors, of course, that the sentencing guidelines require me not to consider. In evaluating a sentence, I must look objectively at the factors, but consider each defendant who comes before me.

The court ultimately concluded that a non-custodial sentence would "deprecate the seriousness of the offense" and sentenced Baxter to 24 months' imprisonment, the low-end of the guidelines range.

## II

Based on the judge's statement that the "sentencing guidelines require [him] not to consider" certain factors, Baxter argues that her sentence is unreasonable. To reach this conclusion, Baxter assumes that the judge refused to consider her character evidence, such as her preparation of tax returns free of charge for senior citizens and military personnel and her volunteer work with the Chamber of Commerce. The guidelines indeed discourage courts from considering these factors. See U.S.S.G. § 5H1.11 (discouraging courts from factoring "military, civic, charitable, or public service; employment-related contributions; and similar prior good works" in deciding whether to depart). Based on this assumption, Baxter concludes that her sentencing was unreasonable because the Supreme Court's decision in *United States v. Booker*,

543 U.S. 220 (2005), required the district court to consider whether her civic and charitable works might have warranted a sentence below the guidelines range. See 18 U.S.C. § 3553(a)(1).

The government argues that we should review Baxter's arguments about her sentencing only for plain error, because Baxter did not object when the district court made the statement at issue. That is incorrect. We have explained that "our decisions after *Booker* . . . assume the absence of any need to object to a sentence as unreasonable

. . ." *United States v. Castro-Juarez*, 425 F.3d 430, 433 (7th Cir. 2005) (rejecting government's urging that defendant's sentence be reviewed for plain error); see also *United States v. Cunningham*, 429 F.3d 673, 679-80 (7th Cir. 2005) ("a lawyer in federal court is not required to except to rulings by the trial judge").

Turning to the merits of Baxter's arguments, a few propositions are well established. First, this court accords a rebuttable presumption of reasonableness to a sentence like Baxter's that is within the guidelines range. See *United States v. Gama-Gonzalez*, 469 F.3d 1109, 1110 (7th Cir. 2006). Since the Supreme Court granted certiorari in *Rita v. United States*, 127 S.Ct. 551 (2006), in order to consider whether any such presumption is consistent with *Booker*, we have also been reviewing the reasonableness of sentences independently. We have followed that practice here as well. Second, we have no quarrel with the general proposition that *Booker* eliminated any notion of factors that may not be considered in sentencing solely because the guidelines so define them. (Naturally, as the government points out, the Constitution still constrains sentencing, and thus a court could not discriminate on the basis of race or sex in its sentencing decisions. See, *e.g.*, *United States v. Wallace*, 458 F.3d 606, 608 (7th Cir. 2006) (sex).) Courts may, however, take into account the fact that the Sentencing Commission thought that certain factors ought to be disfavored, as long as they ultimately consider whether the guidelines sentence conforms to the factors in 18 U.S.C. § 3553(a):

> [T]he defendant must be given the opportunity to draw the judge's attention to any factor listed in section 3553(a) that might warrant a sentence different from the guidelines sentence for it is possible for such a sentence to be reasonable and thus within the sentencing judge's discretion under the new regime . . . .

*United States v. Dean*, 414 F.3d 725, 730-31 (7th Cir. 2005). Accord *Cunningham*, 429 F.3d at 676. We have recognized repeatedly that it might be appropriate for a sentencing judge to consider a defendant's charitable works even though § 5H1.11 says that such works are "not ordinarily relevant" to a guidelines calculation. U.S.S.G. § 5H1.11; see *Wallace*, 458 F.3d at 608; *United States v.*

*Long*, 425 F.3d 482, 488 (7th Cir. 2005). Indeed, unlike some other courts, see, e.g., *United States v. Duhon*, 440 F.3d 711, 717 & n.4 (5th Cir. 2006), we have said that district judges in this circuit are not even required to explain why they have chosen to disregard a guidelines provision like § 5H1.11, see *United States v. Repking*, 467 F.3d 1091, 1095 (7th Cir. 2006) (per curiam).

Baxter admits that she merely assumes that in exercising its discretion under § 3553(a), the district court ignored the now-permissible factors of her civic and charitable work. The record conclusively refutes that argument. On the one hand, the court never mentioned § 5H1.11 or indicated that anything Baxter had mentioned was off limits. On the other hand, the sentencing transcripts affirmatively indicate that the district court understood that it had discretion to consider Baxter's civic and charitable works. The court allowed Baxter to submit a substantial amount of evidence that pertained to such activities, including the testimony of the four witnesses who testified to her charitable nature; numerous letters that chronicled her charity work and her volunteer position with the Chamber of Commerce; and the oral presentations of both of her attorneys who described her charity work in detail. More than that, the court made it clear that it had reviewed these materials. And when it finally pronounced its sentence, the court specifically referred to Baxter's "history and characteristics"—the factor in § 3553(a) that her civic and charity work bore upon—stating that "the history and characteristics of Ms. Baxter, of course, dictate towards a lighter sentence . . . ."

Baxter's sentence is not unreasonable just because the district court was not persuaded to dip below the guidelines range. As this court has explained, "[a] sentencing judge surely may elect to treat a defendant's contributions to his community as . . . grounds for a less severe sentence, but such contributions do little to establish that a sentence within the Guidelines range is unreasonable." *United States v. Della Rose*, 435 F.3d 735, 738 (7th Cir. 2006).

Baxter makes one final argument that we readily dismiss. Acknowledging that she agreed to the tax loss amount in her plea agreement and that she did not object to the amount in the district court, she argues that the court nonetheless committed plain error, see *United States*

*v. Groves*, 470 F.3d 311, 330 (7th Cir. 2006), by attributing to her a $576,000 loss. She contends that the loss was actually only $515,000, which she argues would have lowered her offense level from 17 to 16, and yielded a guidelines range of 21 to 27 months as opposed to 24 to 30 months. Baxter's position is based entirely on "post-sentencing research," which she appends to her brief. But "[a]n appellant may not attempt to build a new record on appeal to support [her] position with evidence that was never admitted in the court below." *Brokaw v. Weaver*, 305 F.3d 660, 668 (7th Cir. 2002) (quoting *United States v. Phillips*, 914 F.2d 835, 840 (7th Cir.1990)); see also Fed. R. App. P. 10(a). We therefore do not consider this argument, nor do we address the government's argument that the district court erred in any event by using the 1995 version of the guidelines rather than the 2005 version, and that under the 2005 version Baxter's sentence would be higher even using her revised figures.

The judgment of the district court is AFFIRMED.

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 04 CR 371 |
| | ) | Violation: Title 26, |
| | ) | United States Code |
| LAURA BAXTER, | ) | Section 7212(a) |
| Defendant. | ) | |

SUPERSEDING INFORMATION

COUNT ONE

The UNITED STATES ATTORNEY charges:

1. At times material to this superseding information:

a. The Internal Revenue Service ("IRS") was an agency of the United States Department of the Treasury, responsible for administering and enforcing the tax laws of the United States.

b. The Internal Revenue Code established laws for the taxation of income. Under these laws, individuals, sole proprietorships, partnerships, and corporations were required to report income to the IRS on income tax returns.

c. The Aegis Company {"Aegis"), based in Palos Hills, Illinois, marketed and sold foreign (also known as "offshore") and domestic trusts through a network of promoters, accountants, and others.

d. Defendant LAURA M. BAXTER was a Certif led Public Accountant, and she worked as an accountant and prepared United States Income Tax Returns since at least 1991. Defendant BAXTER operated her own accounting practice, "Baxter Accounting," in Frankfort, Illinois.

2. From in or about April 1995 to on or about August 8, 2000, at Frankfort, in the Northern District of Illinois, Eastern Division, and elsewhere,

LAURA M. BAXTER,

defendant herein, did corruptly endeavor to obstruct and impede the due administration of the internal revenue laws by:

a. Aiding, assisting, procuring, counseling, and advising the preparation and presentation to the Internal Revenue Service of United States Individual Income Tax Returns (Forms 1040), Income Tax Returns for an S Corporation (Forms 1120S), and Fiduciary Income Tax Returns

(Forms 1041) for at least ten taxpayers and their businesses, who used the Aegis trust systems, for calendar years 1994 through 1999, which returns were false and fraudulent as to material matters;

b. On or about October 29, 1997, submitting a falsified document to an Internal Revenue Service auditor designed to delay, frustrate, obstruct, and impede the audit of an Income Tax Return (Form 1040) she had filed or caused to be filed for calendar year 1995; and

c. Assisting in the submission of a letter to the Internal Revenue Service in late 1999 or early 2000, designed to delay, frustrate, obstruct, and impede the audit of an Income Tax Return (Form 1041) she had filed or caused to be filed for calendar year 1997;

In violation of Title 26, United States Code, Section 7212(a).

/s/ Patrick J. Fitzgerald

UNITED STATES ATTORNEY

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 04 CR 371 |
| | ) | |
| LAURA BAXTER, | ) | Chicago, Illinois |
| | ) | May 24, 2006 |
| Defendant. | ) | 2:00 o'clock p.m. |

TRANSCRIPT OF PROCEEDINGS - Sentencing

BEFORE THE HONORABLE JAMES F. HOLDER MAN

APPEARANCES:

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(Proceedings In open court.)

THE CLERK: 04 CR 371, U.S.A. versus Laura M. Baxter.

MR. HEINZE: Good afternoon, Your Honor. Steve Heinze and Pat King for the United States.

THE COURT: All right. Good afternoon.

MR. SPIELFOGEL: Good afternoon, Your Honor. Keith Spielfogel and James Montgomery on behalf of Laura Baxter, who is present in court.

THE COURT: Yes. Good afternoon.

MR. MONTGOMERY: Good afternoon, Judge.

MR. CHRISTIANSEN: Good afternoon, Judge. United States Probation Officer Jason Christiansen for Kelly Rice.

THE COURT: Good afternoon. Thank you for coming in, Mr. Christiansen.

And good afternoon, Ms. Baxter. Ms. Baxter, if you could step forward, please.

Ms. Baxter, have you had a chance to review the revised Presentence Investigation Report, the report that is dated May 1, 2006?

THE DEFENDANT: Yes, I have.

THE COURT: Are there any changes or modifications that

need to be made in the factual statements set forth in that report?

THE DEFENDANT: My daughter's last name Is Galvin, not Baxter.

THE COURT: All right. And where Is that noted? Let me ask counsel.

(Defendant conferring with her counsel.)

MR. CHRISTIANSEN: Your Honor, Judge, It's on page 16, line545.

THE COURT: All right.

MR. SPIELFOGEL: That's correct, Judge.

THE COURT: Thank you. The first name is spelled correctly, though?

THE DEFENDANT: That's correct.

THE COURT: All right. That change should be made. Any other changes or modifications?

MR. SPIELFOGEL: No, Judge.

THE DEFENDANT: No.

THE COURT: No? Anything from the government?

MR. HEINZE: No, Your Honor.

THE COURT: All right. I have or I had reviewed the materials submitted in connection with the hearing that we had some time ago.

I issued an opinion on that point and determined, based upon the materials submitted and for the reasons stated therein, that Ms. Baxter's total offense level is a level 17, her criminal history category is a I, and the sentencing advisory guideline range is 24 to 30 months of Imprisonment.

All right. Having made that determination, let's proceed to the next point, unless anyone has anything else they desire to say with regard to the guideline calculation?

MR. SPIELFOGEL: We do not, Judge.

MR. HEINZE: Nor do we.

THE COURT: All right. Let me then first hear from defense counsel, then from the government, and then from Ms. Baxter herself.

MR. SPIELFOGEL: Thank you, Judge. You can have a seat.

MR. MONTGOMERY: Sure.

MR. SPIELFOGEL: Is that okay?

THE COURT: All right. If any counsel desires to be seated or Ms. Baxter desires to be seated, you may do so.

MR. SPIELFOGEL: Thank you, Judge.

Judge, I do have a presentation that I want to make this afternoon. Obviously considering the seriousness of what is going on in this courtroom this afternoon and on the changes that have taken place in the law, I wanted to spend time going over with this Court the factors that are listed in § 3553.

THE COURT: All right. You may do so.

MR. SPIELFOGEL: Thank you, Judge.

And, as this Court is well aware, beginning in 1987 up until January of last year, basically when a defense lawyer came with a client to sentencing, we were faced with figuring out what the sentence was within the guidelines, and under most circumstances, that is the sentence that a client received.

Even during that period, § 3553 still existed. It just didn't come into application as much because of the guidelines. Now, because of Booker that came down in January of last year, § 3553 has, once again, moved to the forefront of sentencing.

Sentences under § 3553 are to be sentences, according to that section, that are sufficient but not greater than necessary to achieve the purposes of the sentencing policies. That is the rule that is laid down in 3553.

When you put that together with the rule that has been laid down in Booker that a sentence must be a reasonable sentence, those are basically the factors that we're looking to.

So what I'd like to do is go through § 3553, through all of the criteria that are listed there, and try to demonstrate to Your Honor and to suggest to Your Honor what we believe is a sentence that is reasonable and that is a sentence that is sufficient but not greater than necessary to meet the requirements of sentencing policy. So let' s look at those sections.

3553 tells a court, suggests to a court that it's -actually directs the court to look to the nature and circumstances of the offense and the history and the characteristics of the defendant.

Well, Judge, the first question that I'd like to direct our attention to is: What are the history and characteristics of

Laura Baxter?

A little bit of this was brought out in the memo that we originally filed on her history, and it's also in the Presentence Report.

Her history and characteristics are those of a young woman who, according to her father, by the time she was in tenth grade, she had decided that she wanted to grow up some day to be an accountant.

The history and characteristics of her is that she devoted her heart, her time, her resources, her energies into obtaining that goal that she had set for herself at such an early time in her life.

She became a woman who is devoted to not only friends, but to building that practice. And through sheer hard work, through sheer honesty in dealing with other people, and through being able to work with people and being a decent person who cared not only about the person as a client, but as a person, she built that practice.

Her history and characteristics are those of a woman who -you have the letters, I'm just going to point to a couple of them - -

THE COURT: Yes, I - -

MR. SPIELFOGEL: - - who it's - -

THE COURT: I have reviewed those.

MR. SPIELFOGEL: - - thank you, Judge - - who possesses in a - - you can't view those letters in any way other than to come to the conclusion that they establish that she possesses compassion for other people, always with a smile.

You have the letters from Michael Galvin. You have a letter from Michael Galvin. Here' s a man who writes to the Court and tells you about the illnesses, the actually very serious illness that his wife faced.

He talks about how Laura Baxter was always there, helping out with that wife when she needed to go to chemo. When it was Laura's turn to take her, she was there for her.

He winds up summarizing in his letter that, "I need Laura to keep holding on." She's one of those people who out of sheer compassion has been there for his family. As you can see In so many other letters, she's been there for so many other people.

You have a letter here, Judge, from a Mallory Galvin. Mallory is a stepdaughter of Laura Baxter's.

In that letter, she says: "Dear Judge Holderman" - - and this is just a very small part of her letter "Laura has shown me what it's like to know what a loving, kind, down-to-earth, generous, and dedicated person is. She is loving and kind to everyone she meets, and these characteristics seem to radiate off of her without her so much as saying a word. Laura is also a very down-to-earth person in that she is humble, and money and fancy things aren't what is important to her."

These letters keep repeating. There's one other one I wanted to refer to. There's a letter from a Sally Domagala.

She's a 48-year-old, self-employed farmer who lives in Peotone, and she writes to the Court: "When my daughter lost her husband to cancer, Laurie served out" - - "reached out with her generosity and kindness, helping my daughter to get back on her feet. When Laurie's mom had breast cancer for the first and second time, Laurie was always by her side comforting and supporting her. When Laurie's secretary's dad was sick and dying, Laurie offered her anything she needed, whether it be time off or just to sit and talk about what to do. When Christmas time comes, one of the things Laurie does is to go out and buy little children's coats and donate them to charity. She has a true kind and helpful spirit, always thinking of others before herself."

Laura Baxter, Your Honor, is a person who was totally aware of how lucky she was to be in the position she was in in our society, because not everyone, obviously, is in that position.

She used that job as an accountant, and it was far more than just a job to her, but she did it and she used it to return things to the community.

You have the letters. You have the information. She would do tax returns for people who were in the Service for nothing. She would charge far less to do tax returns for senior citizens, and she would charge less for people who just weren't in a position to pay the normal price that was paid for tax returns.

You have a letter from Robert Kennedy, who is an executive vice president of Heritage Bank, and I think this speaks volumes about the Laura Baxter that I've come to know over the last several years.

He tells you that she was on the board of trustees for the commerce department, for the chamber of commerce, and he had the good fortune to work with her for approximately ten years. You see how he describes her as a hard-working, honest person.

But he tells you that she literally put in hundreds of hours for that chamber of commerce without ever in any way seeking recognition from other people. She didn't need people to tell her, "This is such a wonderful thing you're doing, Laura," because that was the person, and that is the person, that she Is, and that Is how she felt she could give something back to society.

Section 3553 says we need to look to the seriousness of the offense, the nature and circumstances of the offense In order to promote respect for the law and to provide just punishment for the offense.

Well, Judge, the seriousness of the offense, we' re standing here in federal court. She's charged with a felony. That's serious. Where it fits on the scale, the sending in of this document that misled the auditor, where that fits on the scale I don't exactly know, and I wouldn't even hazard a guess.

I do know, Judge, that what she did was absolutely wrong. I do know that the government needs to be able to collect taxes, because that money, whatever we think about what the government may or may not do with that money, it's very important that this great country have those funds to do things, a lot of the wonderful things that we do, both in this country and around the world.

So there is no question that that element of it is serious, but I am asking this Court, when you think of the nature and circumstances of this offense, I'm asking you to take into account two things, Judge, under this particular factor of 3553.

The first thing I'd ask you to consider, Judge, is that Laura Baxter did thousands of tax returns. She had many, many clients. You have before you one incident in which she submitted a document that she should not have submitted.

I believe that you can conclude, Judge, that under the circumstances of this case, that what she did on that particular day in submitting this document was such a huge aberration from the way she has conducted herself as an accountant and a person outside being an accountant that you can come

to the conclusion that this was something that just happened, that never happened before, and obviously never happened again.

And the second thing I would ask you to consider, Judge, 1s you do have the 1etter from Ken Gray. Ken Gray was a prosecutor, he has taught 1aw enforcement. He knows Laura Baxter. He knows her husband, Peter Galvin.

He wrote a letter and explained to this Court that, at times, he was counseling Ms. Baxter and Mr. Galvin. They weren't married at that time. But he said that they were having extremely difficult problems right at the time that she sent in the document that should not have been sent in. She also refers to it in her version of the offense.

It was an extremely stressful time. Mr. Galvin had left the home. There had been all kinds of disagreements. And that was the circumstances under which she submitted It.

Is it an excuse, Judge? No, it is not. But it is something that I would ask this Court to consider under 3553.

To provide just punishment, that's something that 3553 refers to. We need a sentence that will provide just punishment.

Well, Judge, when I was thinking about that one, all I could think about is you have a woman before you, a person before you -- it doesn' t matter, a woman or man - - who develops a dream very early in her life. She spends 20 years building up that dream, and one day, lo and behold, just through hard work and through being able to work with people and having concern for people, she realizes that dream. She becomes what she's always wanted to be. She develops from that respect for the -- from the community. She develops respect for herself. She develops an independence that up until this time perhaps hadn't been as strong.

She 1oved what she was doing. This was a work of joy. She hired people. You have letters from a woman who worked with her for 14 years that are just absolutely glowing. She loved coming to work. She loved doing what she was doing.

Then one day, Judge, in March of 2000, she came to work, and waiting for her at work were numerous agents. They had every right In the world to be there. They had a search warrant. And they went and they took what f iles they needed out of the office.

But the Important point is, Judge, that six years ago, Laura Baxter's dream turned into an absolute nightmare.

From that day forward, there wasn't practically an evening that she wouldn't go to sleep and wake up thinking about, "Oh, my God. What has happened here? What have I done? What is going to become of me?"

Every morning when she woke up in the morning, the first thought that came to her mind is the situation that she has been in, not knowing what is going to happen with her life from that point on.

To the outer world, I think for the last six years, she's tried to portray this sense of being strong. She doesn't want others to feel bad for her. But inside, Judge, what's going on is just such an incredibly different story, and I think it's best illustrated in two ways.

The first way is a letter that her mother, Lillian Baxter, wrote to this Court very briefly.

What she says is that: "During the last five-and-a-half years, I have had to witness helplessly the torment my daughter is going through. She has been whipping herself ceaselessly for being so stupid and gull able.

"No one knows how to console her or how to deal her with her grief. She still tries to put on a happy face and act as though things will work out, but the pain is ridden all over her face.

"Laura has lost many things because of this case. The final loss is her company. She sold the one thing that she was most proud of and that she spent the last 24 years working to achieve.

"She is at a loss as to what to do with herself now, since at the age of 15, she has wanted to do nothing but what she can no longer do. She is now stripped of the very thing that used to define her as to a professional she was.

"I also feel that my daughter is struggling with depression. She is always questioning what others now think of her, how she is humiliated, and that she has lost every shred of dignity she ever had, If you ask her, she will say she is fine, but I worry about her state of mind."

Judge, in the version that Ms. Baxter submitted to the Court, again, briefly, she stated in that version: "I am deeply remorseful for my actions. I don't think I can adequately express through words my utter disbelief and shame at the events that have unfolded.

"I used to walk through town with my head held high and stop and chat with everyone I pass. I now cannot bring myself to walk through town anymore. I do not want to see anyone or attend any events where any of my old business associates

or peers may be In attendance. I am too ashamed.

I do not like to think about the whispering going on behind my back. Others may forgive me for the events that have transpired and they may forget, but I will never forgive myself, nor wi11 I forget."

Your Honor, I feel and I would suggest to this Court that the punishment that Laura Baxter in losing all of the things -and I'm not just talking about the business, which, of course, is tremendous, but all of the other things that have been described here -that the punishment she has suffered to this day exceeds the punishment that is required to make society whole for the transgression that brings her before this Court. She has been punished. She's been punished for six years.

Section 3553 says that the Court should look to the question of protecting the public from other crimes of the defendant.

Laura Baxter has been a law-abiding citizen her entire life. The public has, of course, absolutely nothing to fear from Laura Baxter. She's been a credit to the public. And I don't believe anyone can possibly stand before this Court and argue otherwise.

Finally, Judge, 3553 says that this Court should look to the kinds of sentences that are available to the Court.

Laura Baxter could be sentenced to five years of probation. She could be required to do community service. She could be forced to spend some of that probationary period in home detention up to the amount that this Court deems to be necessary. She could be required to pay a hefty fine in addition to all these other conditions, and she could also have other conditions put on her probation as this Court deemed appropriate.

When you look at the facts and the factors under 3553 and how they lie in this particular case with this particular defendant, I believe under Booker, a reasonable sentence would be a sentence that Is probation with certain of these conditions, whichever ones this Court deems necessary.

I believe that under the facts of this case and under the dictates of 3553, when you look to the main objective that the sentence be substantial but not -- let me get the exact -sufficient but not greater than necessary, the probationary sentence that I am suggesting to this Court meets that exact criteria. This Is an unusual case, and these factors meet those conditions.

Your Honor, I just want to say one other thing in closing. I have had the honor over the last several years - - it's been a few years at this point - - to get to know Laura Baxter and the

privilege to meet members of her family.

I have been practicing law for 30 years, and I can't say to this Court that I have ever stood before a court with a client who's anywhere as near in similar circumstances as Laura Baxter is as she stands here today.

I have never stood with a client who is more deserving of receiving some -based on everything she's been her entire life, based on what formed the basis of the plea in this case, she is deserving of an alternative sentence that eliminates prison in this case, and I'm asking this Court, under Booker and under 3553, to impose such a sentence, and I thank you very much.

THE COURT: Thank you.

MR. MONTGOMERY: May it please Your Honor.

I am not going to repeat anything that's been said because I don't think I could say it half as well.

THE COURT: All right. Mr. Montgomery.

MR. MONTGOMERY: I did, Your Honor, want to indicate to you that since the commission of this offense some years ago, Laura has had the privilege of joining a family of a very large, honest, God-fearing, hard-working family, the Galvin family, and I've had the privilege of knowing that family for the last 15 years, and they are a great support system for Laura.

And whatever Your Honor does here, they will be here to support her. Most of them are sitting here in this room.

I would suggest to Your Honor that as I have observed in the last several months the U.S. Attorney's Office basically taking a policy of recommending guideline sentences, I understand that to be the policy.

And obviously uniformity in sentencing has its value. It's good, it has some merit. On the other hand, people are different, their circumstances are different, and, fortunately, the courts do -while they require Your Honor to look at and consider those guidelines, it simply does not tie your hands in an appropriate case.

I would urge Your Honor, as my colleague has, to have you consider not only Laura and her own personality and her life work that she's been involved in and the pain that she has been suffering over the last six years, but I would also ask you

to think about her family.

I would also be very thankful for Your Honor for having delayed this sentence, because in the interim, Laura has had a beautiful six-month-old daughter, and I would just thank Your Honor for that consideration and ask you to give serious consideration to granting her probation and, at most, Your Honor, a home-confinement situation so that she might nurture and bond with her child.

Thank you.

THE COURT: All right. I will hear from the government.

MR. HEINZE: Your Honor, you've been presented with a great deal of Information throughout this whole process, and I'll try and be brief.

As you know, since Booker, the sentencing guidelines still are a very important part, in fact, the starting point, of the determination of what a reasonable sentence is in any case, and a sentence within the guidelines range is presumptively reasonable. Courts above this one have said that.

It's the government's view that a sentence within the guideline range, that is, 24 to 30 months, is not only presumptively reasonable, but it's also appropriate in this case.

And I, too, would like to direct Your Honor to looking at the factors under 3553(a) which, as Mr. Spielfogel said, we also need to consider at this point.

The very first point under 3553(a), which Mr. Spielfogel mentioned, was the nature and circumstances of the offense and the history and characteristics of the defendant.

Now, Mr. Spielfogel focused almost entirely on the history and characteristics of Laura Baxter. I'd like to talk for a few minutes about the nature and the characteristics or the circumstances of the offense.

As you know, the tax loss in this case is a very significant one. It's over $500,000. But more important than just that dollar amount is the fact that Laura Baxter, a CPA, deliberately fabricated a false document in order to impede the IRS and stop the audit that was going on.

Now, contrary to what Mr. Spielfogel said about this being an aberration, just one incident on a single day that's so different from everything else in Laura Baxter's life, the facts show that, in fact, before she submitted that document, she had been putting off that auditor for months.

That auditor had made several different requests for information that she either ignored or didn't answer, answer phone calls.

At one point, Laura Baxter called the auditor's supervisor and accused the auditor of conducting a witch hunt, and, in fact, as we know, there certainly --it wasn't a witch hunt at all, because, in fact, as Laura Baxter showed with the documents she created, she was trying to hide precisely what that auditor was looking for.

And, still, much later, you've seen evidence that in a conversation a year and a half after this, when Laura Baxter was talking to Undercover Agent Michael Priest, she talked about how she cut off this audit before it got too far.

That's not just an aberration on a single day, Your Honor. This is something that she thought about. She repeatedly tried to impede the IRS in this matter and was proud of it a year and a half later. It was not something that was simply a spur-of-the-moment mistake or aberration.

It was premeditated and part of her whole attempt to impede the IRS.

Again, as you've heard, she's a CPA. It's not just any person who's trying to put off the auditor by not answering phone calls. It's someone who's highly trained in this area and who has a higher duty in responding to the IRS and providing the IRS with accurate and complete, truthful information when asked to do so.

You've heard about the many good things that she's done. Frankly, Your Honor, she's not that different from many other defendants that come before Your Honor.

Many defendants, most of them, in fact, have families. Most of them have people, lots of people who care for them. Many of them do a lot of other good things outside of what brings them before Your Honor. But, in fact, we do need to focus on the offense in this case.

The other factors under 3553 also suggest that a guideline sentence is, in fact, appropriate in this case and reasonable.

The seriousness of the offense, the need to have a sentence that promotes respect for the law, you know, there's almost an epidemic in this country these days in false accounting, you know, cases we hear about with people producing false balance sheets, false tax returns, false filings. This is something that has to be addressed and can't be just shrugged off and ignored. It is, in fact, a very serious problem, and we need a significant sentence to address it.

Serious - - similarly, you know, the 3553 also talks about how you need something to provide adequate deterrence to criminal conduct. That's another factor that they list.

Again, it may not be specific for deterrence that we need for Laura Baxter. She's probably not going to file any more false tax returns. But in terms of general deterrence throughout the country, we do need that.

The defense has asked you to impose nothing more significant than home confinement, and, quite frankly, Judge, home confinement would - - a sentence that's limited to that would really deprecate the seriousness of the offense in this case.

For all these reasons, Your Honor, the government respectfully suggests that a sentence within the guidelines is, in fact, the appropriate one in this case.

THE COURT: Okay. Thank you.

Ms. Baxter, before I determine the appropriate sentence in your case, I want to hear anything you want to say.

You may approach the podium and stand at the microphone so that I and my court reporter and everyone in the courtroom can hear what you have to say.

THE DEFENDANT: Okay. I was going to try to make this statement just off the cuff and not write it down, but I decided yesterday that I just was not going to be emotionally capable of doing that, so I decided to write it down, and so I am going to try and read it.

I cannot fully express how deeply sorry I am for submitting the document to the IRS. I should never have acted so hastily for my own benefit, no matter what other events were happening in my life at the time. It was wrong, plain and simple.

I will forever be remorseful for this event; not just for what it has caused to happen to me, but more importantly for the distress I have caused to those who love me.

I take full responsibility for my actions and can assure the Court that it will never happen again.

I'm a very close person when it comes to my personal feelings and hardships. I usually will shrug things off and minimize events in my life to make those around me feel better. Therefore, I find it very difficult to express what the past six years has been like for me.

I cannot remember the last time I slept through the night and wasn't awakened by thoughts of this case.

I have agonized over what will happen, when it will happen, how it will happen, and what the outcome may be. I have spent countless hours crying by myself in utter disbelief of the mess I have made of my life.

I have caused the people who love me to be subjected to helpless misery. I have lost my business and with it my dreams and numerable friendships.

It has been wrenching to watch what I have put my husband through. He has had to endure far more than he ever should have by my hand.

I have been publicly ashamed and humiliated, and I will forever be labeled by these events.

The only thing I have had -- held onto throughout this ordeal is my family and close friends. I cannot thank them enough for all the support they have shown me, nor can I adequately express how deeply sorry I am for bringing these events into their lives.

I am begging you, Your Honor, to have compassion today and allow me to stay at home and move on with the job of raising my daughter and caring for my husband and family. We have been all through so - - we've all been through so much, and I need to finally move forward with my life.

Thank you, Your Honor.

THE COURT: Anything further from anyone?

MR. SPIELFOGEL: No, Judge.

MR. HEINZE: No, Your Honor.

THE COURT: Anything further at all, Ms. Baxter?

THE DEFENDANT: No.

THE COURT: This is a difficult sentencing. I reviewed the evidence many times, reviewed the letters that counsel have

referred to many times, evaluated the Presentence Investigation Report, the government's position with regard to the guideline range.

The government sought a greater range than I ultimately determined would be appropriate. I ruled in favor of Ms. Baxter's position on that. I denied the government's objections.

Looking at the factors of 3553(a) of Title 18 -16 and counsel have mentioned many of them -the first factor is, of course, the nature and circumstances of the offense. That is coupled in the same numeric subsection with the history and characteristics of the defendant.

The tax loss of over a half million dollars is a substantial offense.

Although Ms. Baxter was not the one who benefitted directly from that loss, Ms. Baxter was the one who impeded the IRS in its investigation of that.

The history and characteristics of Ms. Baxter, of course, dictate toward a lighter sentence, but that is coupled with that preliminary phrase in (1) of § 3553(a)(1), that is, the nature and circumstances of the offense.

The sentence has to reflect the seriousness of the offense, promote respect for the law, and provide a just punishment for the offense.

It has to afford adequate deterrence to criminal conduct. I don't believe - - and that is (B) of § 3553(a)(2).

I think the reference there, adequate deterrence to criminal conduct, is not specific deterrence of the defendant, because I believe Ms. Baxter wi11 never again engage in criminal conduct. But 11 is to provide general deterrence.

Subsection (C) deals with protecting the public from further crimes of the defendant, and I have already said that I believe Ms. Baxter will not engage in further conduct.

Let me just inquire of counsel on this point. Has Ms. Baxter surrendered her license before sentencing today?

MR. SPIELFOGEL: I have received phone calls concerning the license. I don't know if they've actually asked her to do that yet.

THE DEFENDANT: No, they haven't.

MR. SPIELFOGEL: They have not.

THE COURT: Okay. And she didn't voluntarily submit that? Even though she sold her practice, she said she lost her practice - -

MR. SPIELFOGEL: That has been sold, and if the Court so requires, she certainly will turn in that license.

THE COURT: All right. There are certain factors, of course, that the sentencing guidelines require me not to consider. In evaluating a sentence, I must look objectively at the factors, but consider each defendant who comes before me.

I believe a custody sentence is necessary, Ms. Baxter. I believe that home confinement would deprecate the seriousness of the offense.

Looking at the range of custody sentences, the low end of the guideline range is 24 months. I have determined that that is the appropriate low end.

And so pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Laura M. Baxter, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 24 months, the low end of the guideline range.

(Outburst from unidentified audience members.)

THE DEFENDANT: Oh, my God.

THE COURT: Upon release from imprisonment, the defendant shall be placed on supervised release for a term of one year.

Within 72 hours of your release from the custody of the Bureau of Prisons, you are to report in person to the Probation Office in the district in which you are released.

While you are on supervised release, you are not to commit another federal, state, or local crime.

You are to comply with all the standard conditions of supervised release.

You are not to possess a firearm or destructive device.

You are to not use any controlled substances illegally.

You are to, as required by law, submit to one drug test within 15 days of when you are released from imprisonment and at least one random or periodic drug test thereafter, not to exceed 104 drug tests per year. The Probation Office can exercise its discretion within that requirement.

You are to cooperate with the DNA sample collection that is required of all defendants.

I am going to impose the lowest financial penalty, as I have imposed the lowest sentence under the guidelines, and that is a $5,000 fine.

Because of that fine, I am not going to impose any costs of incarceration or supervision. The government has made no specific request in that regard.

You must, however, pay first the $100 special assessment. The fine and the special assessment are due immediately.

You have a right to appeal from the decisions that I have made here today in connection with your sentence.

Do you understand that, Ms. Baxter?

THE DEFENDANT: Yes.

THE COURT: I am sorry. I didn't hear you.

THE DEFENDANT: Yes.

THE COURT: All right. And, Mr. Spielfogel, you will assist, Mr. Montgomery, you will assist the defendant in filing that notice of appeal if she desires?

MR. SPIELFOGEL: Yes, Judge.

MR. MONTGOMERY: Yes.

THE COURT: All right.

MR. SPIELFOGEL: Judge, I'd ask there be no interest on the fine while she's in custody.

THE COURT: Interest will not be imposed on the fine.

We need to set a surrender date, unless the government thinks otherwise at this point.

MR. HEINZE: I think you should set a date, Judge.

THE COURT: All right.

MR. SPIELFOGEL: I'd ask for approximately 90 days, Judge.

THE DEFENDANT: Oh, God.

THE COURT: All right. Let me ask the Probation Department, what is the length of time that will be necessary for a designation?

MR. CHRISTIANSEN: The Bureau of Prisons requests six weeks to complete the designation, Judge.

THE COURT: All right. Is there a reason why you want 90 days?

The sooner she commences this sentence, the sooner it will be over and the sooner she will be back to her family.

THE DEFENDANT: Oh, God, I don't believe it. Oh, Jesus.

MR. SPIELFOGEL: Judge, I think in order to get her affairs in order and to deal with the things that she's going to need to deal with - -

THE DEFENDANT: Oh, God.

MR. SPIELFOGEL: - - I would ask for 90 days.

THE COURT: All right. Does the government object to 90 days?

MR. HEINZE: No, Judge.

THE COURT: All right.

MR. SPIELFOGEL: Judge, we're asking for a recommendation of Pekin.

THE COURT: I will recommend the Bureau of Prisons facility at Pekin, Illinois. I believe that is the appropriate facility for Ms. Baxter.

Ninety days from today, I will ask my clerk to provide us with a date for that.

THE CLERK: August 24th.

THE COURT: All right. No later than noon on August 24, you should report to the designated institution. Or if you cannot obtain transportation to the designated institution, you should report to the marshal's lockup here.

I believe the Bureau of Prisons probably will find, although the Bureau of Prisons must make its own determination, will find that Pekin is the appropriate facility. It is close enough to the Chicagoland area so family members may visit Ms. Baxter during her period of incarceration.

Is there anything else we need to take up?

MR. HEINZE: No, Your Honor.

MR. SPIELFOGEL: There is not, Judge.

THE COURT: All right. Thank you.

MR. SPIELFOGEL: Thank you, Judge.

THE COURT: We will stand in recess.

(Proceedings concluded.)

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1299

# In the Supreme Court of the United States

LAURA BAXTER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

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# In the Supreme Court of the United States

No. 06-1299

LAURA BAXTER, PETITIONER

*v.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES**

Petitioner contends that the procedures applied in the determination of her sentence are not in accordance with *United States* v. *Booker*, 543 U.S. 220 (2005). On November 3, 2006, this Court granted certiorari in *Claiborne* v. *United States*, No. 06-5618 (argued Feb. 20, 2007), and *Rita* v. *United States*, No. 06-5754 (argued Feb. 20, 2007), to address various aspects of sentencing procedure under *Booker*. Because the proper disposition of the petition for a writ of certiorari may be affected by the Court's resolution of *Claiborne* and *Rita*, the petition should be held pending the decisions in those cases, and then disposed of as appropriate in light of those decisions.*

* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

APRIL 2007

(3)

No. 06-1299

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SUPREME COURT, U.S.

# In The
# Supreme Court of the United States

LAURA BAXTER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR REHEARING FROM DENIAL OF PETITION FOR A WRIT OF CERTIORARI

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## PETITION FOR REHEARING FROM DENIAL OF PETITION FOR A WRIT OF CERTIORARI

Laura Baxter (hereafter petitioner) respectfully moves this Court for an order (1) vacating the denial of her petition for writ of certiorari entered on May 21, 2007, and (2) granting the petition. In the alternative, petitioner respectfully moves the Court for an order (1) vacating the denial of her cert petition entered on May 21, 2007 and (2) granting the petition and remanding petitioner's case to the Seventh Circuit for proceedings consistent with the Court's pending opinion(s) in *Claiborne v. United States,* No. 06-5618, *cert. granted*, 127 S.Ct. 551 (2006) and *Rita v. United States*, No. 06-5754, *cert. granted*, 127 S.Ct. 551 (2006). The Court heard oral arguments in *Claiborne* and *Rita* on February 20, 2007. Petitioner suggests that this Court's decision in *DeMaree v. United States,* No. 06-8377 will directly impact this petition for rehearing (reasons, *infra*).

## REASONS IN SUPPORT OF REHEARING

1. Petitioner's sentencing, in the district court and on direct appeal to the Seventh Circuit, was governed by [the] "presumption of reasonableness" which the Seventh Circuit engrafted into federal sentencing appeals (post-*Booker*) starting with *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) ("The best way to express the new balance, in our view, is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable *presumption of reasonableness.*") (ital. emph. added). The Seventh Circuit has perpetuated its reasonableness presumptions to current sentencing litigation, *cf. United States v. Duncan*, 479 F.3d 924, 930 (7th Cir. 2007) ("A sentence within a properly-calculated Guidelines range is entitled to a presumption of reasonableness.") (citing *Mykytiuk*, *ante*).

2. On April 20, 2007, the Solicitor General, acknowledging the potential impact of *Claiborne* and *Rita,* filed its

memorandum position in petitioner's case. The Solicitor General, citing *Claiborne* and *Rita* (and *Booker*) wrote:

> Because the proper disposition of the petition for a writ of certiorari may be affected by the Court's resolution of *Claiborne* and *Rita*, the petition should be held pending the decisions in those cases, and then disposed of as appropriate in light of those decisions.

Solicitor General Mem. at p. 1. Petitioner embraces the government's position which urged that the case be held pending *Claiborne* and *Rita*.

In her cert petition, she also contended that review should be granted because the government's brief in the United States Court of Appeals for the Seventh Circuit urged affirmation based on *United States v. DeMaree*, 459 F.3d 791, 794-95 (7th Cir. 2006) (Posner, J.) (pp. 21-22 of government's Seventh Circuit brief). In substance, *DeMaree* held that the district court was required to apply Guidelines in effect at the time of sentencing, as opposed to Guidelines in effect at the time of the offense (meaning that petitioner should have been exposed to a higher Guideline sentencing range).

*DeMaree's* cert petition, No. 06-8377, remains pending – the government's brief in opposition was filed on March 12, 2007, and *DeMaree* filed her reply on April 9, 2007. Hence, the Court's disposition of *DeMaree's* cert petition directly impacts petitioner's case.[1]

3. Petitioner's cert petition reproduced a statement by the district court in advance of sentencing:

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[1] Petitioner raised her *DeMaree* issue at pp. 15-18 of her cert petition. The government filed its memorandum in petitioner's case on April 20, 2007, waiving a *DeMaree* response unless otherwise directed by the Court. However, it filed its *DeMaree* brief in opposition in No. 06-8377 on March 12, 2007. The government eschewed referring to its *DeMaree* brief in opposition while responding to petitioner's cert petition.

> The Court: There are certain factors, of course, *that the sentencing guidelines require me not to consider.*

Transcript of 5/24/06 at Tr. 27; petitioner's cert petition at App. 29. Petitioner had urged a suspended custodial sentence in light of her multiple "good deeds" in accordance with U.S.S.G. § 5H1.11 and 18 U.S.C. § 3553(a). From all that appears, the district court may have felt it was prohibited from giving petitioner plenary consideration for her many "good deeds," while determining the need to impose a custodial sentence.

On direct appeal, the Seventh Circuit declined remand which would have provided the district court with an opportunity to explain what it meant – factors prohibited from sentencing consideration.

The Seventh Circuit heard oral argument in petitioner's appeal on February 27, 2007. During argument, the government urged affirmation contending, *inter alia,* that in light of *United States v. DeMaree, ante*, the district court erred in imposing sentence pursuant to the advisory guidelines in effect at the time of offense, rather than at the time of sentencing in accordance with 18 U.S.C. § 3553(a)(4)(A)(ii). Thus, according to the government, on sentencing remand, petitioner would be exposed to a longer guidelines sentence, and the appellate panel orally expressed its concern regarding the potential for a longer sentence on remand (embracing *DeMaree*) – which clearly contributed to appellate affirmation.[2]

4. During petitioner's May 24, 2006 dispositional hearing the district court commenced sentencing by referring to the advisory U.S.S.G. sentencing range (24-30

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[2] In light of *Claiborne, Rita* and *DeMaree*, the district court has permitted petitioner to remain enlarged on a personal recognizance bond pending certiorari and this petition for rehearing. Moreover, Chief Judge Holderman, the presiding Judge in petitioner's case, recently rejected the holding in *DeMaree*, see *United States v. Monti,* 477 F.Supp.2d 943 (N.D. Ill. 2007) (Holderman, Ch. J.).

months) based on a tax loss of approximately $500,000. The facts below disclosed that petitioner had been a Certified Public Accountant, and had received client referrals from sophisticated tax shelter promoters (all since indicted and awaiting trial in the U.S. District Court in Chicago). She pled guilty to a single count information based on her tax preparations for a single taxpayer. During the late 1990s, those tax returns were the subject of an IRS audit. Petitioner pled guilty to obstructing that audit. Ironically, post-audit, and pre-criminal charges, petitioner completed amended tax returns and the tax shelter-taxpayer remitted every cent the government claimed was owed by virtue of his tax shelter participation. The government's tax loss calculations were predicated on the IRS audit and the taxpayer made full restitution to the IRS (again, years before petitioner was charged).

More to the point, in *United States v. Kosinski*, 480 F.3d 769 (6th Cir. 2007), the court considered whether the sentencing court must consider the "tax loss" in determining a proper sentence in connection with 18 U.S.C. § 3553(a). While vacating and remanding, the Sixth Circuit explained that the district court *was not required to calculate or consider the tax loss in advance of imposing sentence* (ital. emph. added). The reversing Sixth Circuit panel explained:

> At resentencing, the district court should recognize and exercise its discretion to consider – or to not consider – Defendant's tax loss.

480 F.3d at 777 (concurring opinion noted).

Petitioner's point is straightforward: within the realm of tax-loss sentencing, the Sixth Circuit has taken the position that the district court has discretion to consider *vel non* the tax-loss within the contours of 18 U.S.C. § 3553(a). Clearly, the position taken by the Sixth Circuit conflicts with the position taken by the Seventh Circuit in petitioner's case.

## CONCLUSION

Petitioner lacks the prevision to predict the Court's opinion(s) in *Claiborne*, *Rita* and *DeMaree*. However, [a] GVR order would permit petitioner to advance the holdings in *Claiborne, Rita* and *DeMaree* to the Seventh Circuit and, hopefully, thereafter to the sentencing court. Petitioner appreciates that [a] GVR order does not constitute a final determination on the merits, nor does it carry precedential weight. See *Tyler v. Cain*, 533 U.S. 656, 666 n. 6, 121 S.Ct. 2478 (2001); *Henry v. City of Rock Hill,* 376 U.S. 776, 777, 84 S.Ct. 1042 (1964).

For the foregoing reasons, as well as those contained in the petition for writ of certiorari, and the Solicitor General's memorandum response, this petition for rehearing should be granted, the petitioner's writ of certiorari should be granted, and petitioner respectfully requests this Honorable Court issue the writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Alternatively, petitioner respectfully requests that this petition for rehearing be granted, the petition for writ of certiorari be granted, and the Court remand this matter for further proceedings in light of the expected opinion(s) from the Court in *Claiborne v. United States,* No. 06-5618; *Rita v. United States,* No. 06-5754, and *DeMaree v. United States,* No. 06-8377.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petiton for Rehearing is restricterd to the grounds set out in Rule 44.2.

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